Supreme Court, U.S.
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No. 93-76

In The

Supreme Court of the United States

October Term, 1993

GEORGE CHERREY, *et al.*,

Petitioners,

vs.

GERALD DIAZ, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the four year limitations period for an action under the Racketeer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1961, *et seq.* begins to run when the plaintiff discovers or should have discovered, both the injury and the defendant's pattern of racketeering, or does it begin to run when the plaintiff discovers or should have discovered, only the injury?

LIST OF PARTIES

Petitioners:

Kathleen Cherrey
George Cherrey

Respondents:

Gerald Diaz
Philip Everson
Alleck Resnick
Resnick, Sopher & Perlow, P.A.
Bay State Title Company
Baltimore Savings and Loan Ass'n, Inc.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

George Cherrey and Kathleen Cherrey ("the Cherreys") hereby respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

Neither the circuit court nor the district court decisions are published.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on April 16, 1993. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

18 U.S.C. § 1962. Prohibited activities

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer,

either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964(c). Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

Petitioners Kathleen and George Cherrey ("the Cherreys") purchased four townhouses located in downtown Baltimore, Maryland from respondents Gerald Diaz ("Diaz") and Philip Everson ("Everson"). Diaz and Everson misrepresented the condition and value of the properties and concealed defects in the properties from the Cherreys. This was done by various schemes, including the use of fake tenants and appraisals. Diaz and Everson told the Cherreys that if they were ever dissatisfied with their purchase, they could rescind it and be released from their obligations. Defendants Baltimore Savings and Loan Ass'n, Inc. ("Baltimore Savings"), Bay State Title Company ("Bay State"), Alleck Resnick ("Resnick") and the law firm of Resnick, Sopher & Perlow, P.A. ("Resnick Law Firm") assisted Diaz and Everson in defrauding the Cherreys through the property sale. Closing on the properties occurred on January 30, 1987. In July 1988, the Cherreys informed Diaz that they wished to rescind the sale and be released from their obligations. Diaz refused. It was not until January of 1991 that the Cherreys first learned that the respondents had defrauded other victims in a similar manner.

The Cherreys filed a complaint against the defendants on April 15, 1991, alleging violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1962(a), (b), (c), (d). Jurisdiction in the district court was based on 18 U.S.C. § 1964(c). In an order dated March 25, 1992, the district court dismissed the complaint on the ground that it was filed more than four years after the Cherreys should have discovered their injury. App. 7a-17a. On April 3, 1992, the district court denied petitioners' motion to amend the judgment. App. 18a-19a.

On May 4, 1992, petitioners filed a notice of appeal. The decision of the district court was affirmed by an April 16, 1993 opinion and judgment of the United States Court of Appeals for the Fourth Circuit. App. 1a-6a.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case for two reasons: (1) because of a clear conflict among the circuit courts; and (2) because the decisions below are in clear conflict with both the intent of Congress and this Court's decision in *Agency Holding Corporation v. Malley-Duff & Associates*, 483 U.S. 143 (1987).

Recovery under RICO requires a plaintiff to prove injury by a pattern of racketeering activity. Four Circuits have ruled that the limitations period for RICO causes of action does not begin to run until the plaintiff has (or should have) discovered both the injury and the pattern. Five Circuits have ruled that the limitations period for RICO causes of action begins to run when the plaintiff has (or should have) discovered the injury, regardless of the discovery of the pattern. This conflict over an important question as to when causes of action begin to accrue should be resolved by this Court.

The Fourth Circuit explicitly acknowledged the conflict in the circuit courts.

> The statute of limitations for a civil RICO action is four years. *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987). The civil RICO plaintiff is permitted to recover damages if he proves that he was injured by the defendant's pattern of racketeering. The two components of this action, injury and pattern, are the basis of a split between the circuit courts of appeal regarding when the statute of limitations in a civil RICO action accrues, or begins to run.
>
> In the Third, Eighth, Tenth, and Eleventh Circuits, the statute of limitations accrues

when the plaintiff discovers, or should have discovered, both his injury and the defendant's pattern of racketeering. *See Glessner v. Kenny*, 952 F.2d 702, 706 (3d Cir. 1991); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin*, 913 F.2d 817, 820 (10th Cir. 1990), *abrogated on other grounds, Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson*, 111 S. Ct. 2773, 2777 n.1 (1991); and *Bivens Gardens v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991). In the First, Second, Seventh, and Ninth Circuits, the statute of limitations accrues when the plaintiff discovers, or should have discovered, only his injury. *See Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992); and *Beneficial Std. Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988).

In *Pocahontas* this circuit adopted the position embraced by the First, Second, Seventh, and Ninth Circuits. "[T]he statutory period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Pocahontas*, 828 F.2d at 220. As a result, a civil RICO action in this circuit is time barred unless filed within four years of the date the plaintiff discovers or should have discovered his injury.

Cherrey v. Diaz, slip op. at 4-5 (4th Cir. 1993) (App. 4a-5a).

With four courts ruling one way and five the opposite way, this clear conflict in the circuits requires resolution by this Court.

When the limitations period begins to accrue in RICO cases is an important issue that should be resolved by this Court. The court below held that it begins to accrue before the petitioners discovered or even should have discovered the existence of a pattern of racketeering activities. However, as the statute makes clear, the existence of a pattern of racketeering activities is a central element of a RICO cause of action; and absent an allegation of same, a RICO action may not be commenced. As this Court noted in *Malley-Duff*, 483 U.S. at 154: "the heart of any RICO complaint is the allegation of a *pattern* of racketeering." (emphasis in original). Allowing the limitations period to begin to run when only injury is known, and not the pattern of racketeering, means that petitioners, and others similarly situated, could be time-barred before they were aware they could commence an action. This obviously "would thwart the legislative purpose of creating an effective remedy." *Malley-Duff*, 483 U.S. at 154.

CONCLUSION

WHEREFORE, the Cherreys respectfully request that this Court grant certiorari in this case to decide this important limitations question and resolve the conflict among the circuits.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED APRIL 16, 1993

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 92-1524

GEORGE CHERREY; KATHLEEN CHERREY,

Plaintiffs-Appellants,

v.

GERALD DIAZ; PHILIP EVERSON; ALLECK RESNICK; RESNICK, SOPHER, & PERLOW, P.A.; BAY STATE TITLE COMPANY; BALTIMORE SAVINGS & LOAN ASSOCIATION, INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court for the District of Maryland, at Baltimore.
Norman P. Ramsey, Senior District Judge.
(CA-91-1361)

Argued: March 2, 1993

Decided: April 16, 1993

Before HALL and LUTTIG, Circuit Judges, and HOWARD, United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by unpublished per curiam opinion.

Appendix A

COUNSEL

ARGUED: Philip Bernard Malter, WHEATLEY & RANQUIST, Annapolis, Maryland, for Appellants. Joel Henry Oleinik, ECCLESTON & WOLF, Baltimore, Maryland, for Appellees. ON BRIEF: Peter A. Goldsmith, Allen D. Freemyer, WHEATLEY & RANQUIST, Annapolis, Maryland, for Appellants. Ronald W. Fuchs, ECCLESTON & WOLF, Baltimore, Maryland, for Appellees Alleck Resnick, Resnick, Sopher & Perlow, and Bay State Title; Kathleen M. McDonald, IRWIN, KERR, GREEN, MCDONALD & DEXTER, Baltimore, Maryland, tor Appellee Diaz; Marc Seldin Rosen, Steven S. Chasman, MARC SELDIN ROSEN, P.A., Baltimore, Maryland, for Appellee Baltimore Savings and Loan; Jay Fred Cohen, Baltimore, Maryland, for Appellee Everson.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Plaintiffs-appellants filed a civil complaint against the defendants-appellees under 18 U.S.C. § 1964(c), a subsection of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). The district court dismissed the complaint after finding it to be time barred. We affirm the dismissal.[1]

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1. The district court dismissed the complaint after the appellees filed a motion to dismiss for failure to state a claim upon which relief could be granted, pursuant to Federal Rule of Civil Procedure 12(b)(6). However, the court based its dismissal on lack of subject matter jurisdiction, pursuant to Federal Rule of Civil Procedure 12(h)(3), rather than on failure to state a claim.

(Cont'd)

Appendix A

I

Because this case comes before us on appeal of a Rule 12(b)(6) dismissal, we will assume that the facts as stated in the complaint are true. *See Martin Marietta Corp. v. Int'l Telecom. Satellite Org.*, 978 F.2d 140, 142 (4th Cir. 1992) ("In considering a motion to dismiss, the claims must be construed in the light most favorable to the non-moving party and its allegations taken as true."). Appellants are George and Kathleen Cherrey ("the Cherreys"). Appellees include the Baltimore Savings and Loan Association, Incorporated ("Baltimore Savings"), and the Bay State Title Company ("Bay State"). Appellee Alleck Resnick ("Resnick") is an employee of Baltimore Savings and Bay State. Resnick is also a principal in the appellee law firm, Resnick,

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(Cont'd)

We note in passing the general rule that a time barred complaint should be dismissed for failure to state a claim, rather than for lack of subject matter jurisdiction. *See Watts v. Graves*, 720 F.2d 1416, 1423 (5th Cir. 1983) (statute of limitations is a "proper" ground for a Rule 12(b)(6) dismissal); *see also* 5A Charles Wright and Arthur Miller, *Federal Practice and Procedure* § 1360 n.10 (1990) (federal courts permit a statute of limitations defense to be filed under Rule 12(b)(6)).

One exception to this rule is that a time barred complaint filed against the United States should be dismissed for lack of jurisdiction, because compliance with the statute of limitations is a condition of the United States' waiver of sovereign immunity. Failure to comply with all conditions of the waiver of immunity deprives the court of jurisdiction. This exception is illustrated in a decision relied upon by the district court in the present case, *Richmond, Fredericksburg, & Potomac R.R. Co. v. United States*, 945 F.2d 765, 768-69 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1667 (1992).

Following the general rule, we will treat the dismissal below as one for failure to state a claim under Rule 12(b)(6) rather than for lack of subject matter jurisdiction under Rule 12(h)(3).

Sopher, and Perlow, P.A. Appellee Gerald Diaz ("Diaz") is a real estate broker, and appellee Philip Everson ("Everson") worked with Diaz in the transactions described in the complaint.

After responding to a newspaper advertisement, the Cherreys purchased several housing units from the appellees in downtown Baltimore at a closing which occumd on January 30, 1987. The Cherreys were unable to conduct a thorough inspection of the units because of the presence of tenants, and the Cherreys failed to arrange an independent inspection or appraisal before closing. However, Diaz and Everson promised to allow the Cherreys to return the units if the Cherreys were dissatisfied. The complaint states that after closing, the Cherreys were unable to inspect the units until a tenant moved "after May 1987." However, the complaint also states that at least one of the units was vacant from the date of closing, January 30, until it was rented in March 1987.

Although they paid for major repairs to the units, the Cherreys were unable to rent the properties in October 1987. In July 1988, the Cherreys informed Diaz that they were dissatisfied and wanted to retum the units. Diaz refused to allow the retum.

The Cherreys filed a civil RICO complaint against the appellees on May 15, 1991. The district court granted the appellees' motions to dismiss the complaint after finding it to be time barred. On appeal, we provide *de novo* review. *See Martin Marietta*, 978 F.2d at 142 ("[D]ismissals for failure to state a claim are reviewed *de novo* on appeal.").

II

The statute of limitations tor a civil RICO action is four years. *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d

211, 220 (4th Cir. 1987). The civil RICO plaintiff is permitted to recover damages if he proves that he was injured by the defendant's pattern of racketeering. The two components of this action, injury and pattern, are the basis of a split between the circuit court's of appeal regarding when the statute of limitations in a civil RICO action accrues, or begins to run.

In the Third, Eighth, Tenth, and Eleventh Circuits, the statute of limitations accrues when the plaintiff discovers, or should have discovered, both his injury and the defendant's pattern of racketeering. *See Glessner v. Kenny*, 952 F.2d 702, 706 (3d Cir. 1991); *Granite Falls Bank v. Henrikson*, 924 F.2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin*, 913 F.2d 817, 820 (10th Cir. 1990), *abrogated on other* grounds, Lampf, Pleva, Lipkind, Prupis, & Petigrow v. Gilbertson, 111 S. Ct. 2773, 2777 n. 1 (1991); and *Bivens Gardens v. Barnett Bank*, 906 F.2d 1546, 1554-55 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991). In the First, Second, Seventh, and Ninth Circuits, the statute of limitations accrues when the plaintiff discovers, or should have discovered, only his injury. *See Rodriguez v. Banco Cent.*, 917 F.2d 664, 665-66 (1st Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1464 (7th Cir. 1992); and *Beneficial Std. Life Ins. Co. v. Madariaga*, 851 F.2d 271, 274-75 (9th Cir. 1988).

In *Pocahontas* this circuit adopted the position embraced by the First, Second, Seventh, and Ninth Circuits. "[T]he statutory period begins to run when a plaintiff knows or should know of the injury that underlies his cause of action." *Pocahontas*, 828 F.2d at 220. As a result, a civil RICO action in this circuit is time barred unless filed within four years of the date the plaintiff discovers or should have discovered his injury.

Appendix A

The Cherreys argue that *Pocahontas* is factually distinguishable from the present case. However, we find their argument unpersuasive. Although the facts of *Pocahontas* may not be identical to the case at bar, we find that we must apply *Pocahontas* because it established a general statute of limitations rule which extends to all civil RICO actions. The facts of particular cases may vary, but the general rule remains the same.[2] As a result, the Cherreys' civil RICO action is time barred unless it was filed within four years of the date they discovered or should have discovered their injuries.

The district court properly applied this analysis in its order dismissing the complaint. The court found that the Cherreys' injury from the appellees' alleged pattern of racketeering was the financial loss the Cherreys suffered at closing by purchasing defective housing units. The court also found that the Cherreys would have discovered their injury by inspecting any of the units after closing, because an inspection would have revealed that the units were in a severe state of disrepair. The court further found that purchasers of real property, such as the Cherreys, had a duty to inspect the property, especially when it was vacant.

Because the Cherreys' complaint indicated that at least one of the units they purchased was vacant from closing on January 30, 1987 until March 1987, the court ruled that the Cherreys should have inspected the unit by March 1987. Because an inspection would have revealed the Cherreys' injury, the court also ruled that the Cherreys should have discovered their injury by March 1987. Applying *Pocahontas*, the district court held that the four-year statute of limitations on the Cherreys' civil RICO action accrued in

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2. Even if we were inclined to disagree with *Pocahontas*, we would not be able to overrule it. *See Brubaker v. City of Richmond*, 943 F.2d 1363,1381-82 (4th Cir. 1991) ("We cannot overrule a prior panel of this circuit.").

March 1987 and expired in March 1991, approximately two months before the Cherreys filed their complaint on May 15, 1991.

We find no error in the district court's reasoning. We agree that the Cherreys suffered a financial injury at closing by purchasing defective housing units. We also agree that they should have discovered their injury by March 1987. Applying *Pocahontas*, the statute of limitations on the Cherreys' civil RICO action expired before the complaint was filed on May 15, 1991. Therefore, we hope that the district court properly granted the appellees motion to dismiss for failure to state a claim upon which relief could be granted.[3]

III

We affirm the district court's dismissal of the appellants' civil RICO complaint for failure to state a claim upon which relief could be granted. Because we affirm the dismissal, we find it unnecessary to reach the appellants' argument that the district court abused its discretion by denying their motion to amend their complaint.

AFFIRMED

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3. The Cherreys urge us to adopt and apply the "rule of separate accrual," a doctrine which creates a separate civil RICO action for each new and independent injury suffered by a plaintiff. *See, e.g., Bankers Trust*, 859 F.2d at 1105 ("civil RICO actions are subject to a rule of separate accrual").

We find it unnecessary to adopt the rule. Even if we applied it in the present case, we would find that the Cherreys suffered no new injuries which were independent of the financial loss incurred at closing. *See Glessner*, 952 F.2d at 707-08 (an injury is not new and independent if it is simply "a recharacterization of [an old] injury" or "the mere continuation of damages into a later period"). As a result, we would affirm the district court's dismissal.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED MARCH 25, 1992

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-91-1361

GEORGE CHERREY, et al.,

Plaintiffs

v.

GERALD DIAZ, et al.,

Defendants

MEMORANDUM AND ORDER

Pending before the Court in the above-captioned case are several motions filed by plaintiffs George and Kathleen Cherrey and defendants Gerald Diaz, Philip Everson, Baltimore Savings and Loan Association, Inc. ("Baltimore Savings and Loan") and Alleck Resnick, Resnick, Sopher & Perlow, P.A., and Bay State Title Company (the "Resnick defendants"). The Cherreys have moved for leave to amend complaint, and none of the defendants oppose this motion. All of the defendants have filed motions to dismiss. In addition to their opposition to a dismissal, plaintiffs have filed motions to strike the reply briefs of Gerald Diaz and Baltimore Savings and Loan.[1] Finally, all the defendants have

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1. Because the motions to strike are not relevant to the central dispute between these parties and only concern the technicalities of the filing of the defendants' reply briefs, the Court shall deny the motions to strike and focus on the merits of defendants' motions to dismiss.

asked for a stay of discovery.[2] The issues have been briefed by counsel for both sides, and the Court will rule without a hearing pursuant to Local Rule 105.6 (D. Md. 1989). For the reasons set forth below, defendants' motions shall be granted.

I. BACKGROUND

This action arises out of a transaction in which plaintiffs George and Rathleen Cherrey claim that they were fraudulently induced by the defendants to purchase real property in Baltimore, Maryland. Defendant Gerald Diaz, who sold the property to the Cherreys along with Philip Everson, is a licensed real estate broker. Defendant Alleck Resnick, Esq., is a principal in defendant Resnick, Sopher & Perlow, P.A., and is also the treasurer of defendant Baltimore Savings & Loan. The closing was conducted by Alleck Resnick and Resnick, Sopher & Perlow, P.A.

According to the complaint, plaintiffs responded to an advertisement in the Baltimore Sun concerning the sale of three rental properties for investment in November, 1986. George Cherrey spoke to Gerald Diaz and Philip Everson several times and arranged to meet with him and to inspect the properties. Diaz represented that, *inter alia*, all three houses were in good condition, well maintained, continuously rented, and inhabited by stable tenants. In addition, Diaz promised to repurchase the properties and assume the mortgages if the Cherreys had any problems with the houses.

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2. Defendant Gerald Diaz and the Resnick defendants have also filed motions to dismiss in two related cases, *Maas v. Diaz*, Civil Action No. R-91-1360, and *Munafo v. Diaz*, Civil No. R-91-1359. They have requested a stay of discovery in each case pending disposition of the motions to dismiss. In light of the Court's disposition of the present motion, defendant's request is moot as it concerns this action.

Appendix B

Without fully inspecting any of the houses, plaintiffs signed a contract on December 30, 1986 to purchase four properties on South Bruce Street from Mr. Diaz and Mr. Everson for $82,000. Sometime in January, 1987, the Cherreys agreed to add a fifth property located on Pratt Street to the deal for an additional $29,900. The closing occurred on January 30, 1987. Plaintiffs signed a mortgage on their home for $29,000 payable to Gerald Diaz and Philip Everson for the Pratt Street property, and a mortgage for $77,000 payable to defendant Baltimore Savings and Loan for the South Bruce Street properties.

The complaint further states that as the original tenants vacated the properties, the Cherreys began to realize that the condition of the houses, particularly the plumbing and the electrical systems, did not comport with defendants' representations or the local housing code. The first tenant left in May, 1987. The house at 336 South Bruce Street, however, was vacant from the time of closing through March, 1987. Plaintiffs were forced to make extensive and expensive repairs to the houses to put them in habitable condition. Ultimately, plaintiffs instituted this action on May 15, 1991.

The plaintiffs allege that during the course of this transaction, various combinations of the defendants violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, ("RICO"). They also claim that the defendants' conduct gives rise to liability under various state tort law theories.

II. STANDARD OF REVIEW OF MOTION TO DISMISS

A motion to dismiss under Fed. R. Civ. P. 12(b)(6) tests the bare legal sufficiency of a complaint. In deciding the motion, the Court must take all well-pleaded allegations of the complaint as

true, and must draw all inferences in favor of the plaintiff. *See Coakley & Williams Inc. v. Shatterproof Glass Corp.*, 706 F.2d 456 (4th Cir. 1983), *cert. denied*, 475 U.S. 1121 (1986). After viewing the complaint in this light, the Court may not grant a motion to dismiss unless it appears *to a certainty* that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of [the] claim. *Rogers v. Jefferson-Pilot Life Ins. Co.*, 883 F.2d 324 (4th Cir. 1989) (emphasis added); *see also Conley v. Gibson*, 355 U.S. 41 (1957).

III. ANALYSIS

A. Statute of Limitations for RICO Claims

Defendants Gerald Diaz, Baltimore Savings and Loan, and the Resnick defendants assert in their motions to dismiss that Counts XI - XIV,[3] which allege that several combinations of defendants engaged in illegal racketeering activity, are barred by the four year statute of limitations for RICO claims. In *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987), the Supreme Court held that the four year statute of limitations which applies to cases arising under the Clayton Act also governs RICO actions. The Court did not decide, however, when a cause of action under RICO "accrues" such that the four year statute of limitations will begin to run.

The circuits are currently split over the proper method of determining when a RICO claim accrues. The Fourth Circuit has

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3. Count XI alleges a violation of 18 U.S.C. § 1962(c) by all defendants. Count XII alleges a violation of 18 U.S.C. § 1962(a) by all defendants. Count XIII alleges a violation of 18 U.S.C. S 1962(b) by all defendants. Count XIV alleges a violation of 18 U.S.C. S 1962(d) by all defendants.

taken the approach that the "statutory period begins to run when a plaintiff knows or should know of the injury that underlies his action." *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987).[4] The closing for all the properties occurred on January, 30, 1987, and it was then that plaintiffs suffered the financial loss which constitutes the ultimate injury in this case. This action was filed on May 15, 1991. Plaintiffs contend that they did not receive notice of this injury until May, 1987, when the first of the original tenants vacated one of the properties and they realized the true condition of the house.[5] The complaint, however, contains several factual allegations which seriously undermine this contention. On the face of the complaint, it is clear that plaintiffs should have known several months before May, 1987 that defendants had misrepresented the condition of the properties and inflated the value of the houses.

The complaint states that the property located at 336 South Bruce Street was vacant from the time of closing on January 30, 1987 through March, 1987.[6] As owners, the Cherreys had full access to the vacant property and ample opportunity to enter the

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4. Many other circuits have adopted this accrual rule. *See Rodriquez v. Banco Cent.*, 917 F.2d 664, 666 (lst Cir. 1990); *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102 (2d Cir. 1988), *cert. denied*, 490 U.S. 1007 (1989); *State Farm Mutual Automobile Insurance Co. v. Ammann*, 828 F.2d 4, 4-5 (9th Cir. 1987).

5. In the Amended Complaint, the Cherreys' specifically assert that "[b]ecause of Diaz's and Everson's statements that the tenants wanted their privacy . . . the Cherreys did not conduct any further inspections of the properties until the tenants left. The first tenant to leave, at 329 South Bruce Street, left after May, 1987." (para. 27).

6. Amended Complaint, ∏ara. 26.

premises and inspect the house until the first tenant moved in in March, 1987. Even the most cursory examination of the property at any time before or after settlement would have revealed that the defective condition of the house did not comport with defendants' representations. Because it is reasonable to require a purchaser of property to make basic efforts to inspect that property, especially when the property is vacant, the Court finds that the Cherreys should have known as early as January 30, 1987, or at least by March, 1987, that the defendants had misrepresented the condition of the properties and caused them to suffer an injury. Indeed, plaintiffs' failure to inspect 336 South Bruce Street both before and after they acquired an ownership interest in it destroys their claim that they only discovered the defects in the properties after the original tenants vacated the properties.

Apparently realizing that the approach of the Fourth Circuit could extinguish their RICO claims, the Cherreys urge this Court not to apply *Pocahontas*. Instead, plaintiffs argue that the appropriate rule is the competing standard applied by the Eighth Circuit in *Granite Falls Bank v. Henrikson*, 924 F.2d 150 (8th Cir. 1991).[7] In order for a RICO claim to accrue for statute of limitations purposes, the *Granite* court held that the plaintiff must have discovered both the injury and the pattern element of the cause of action. 924 F.2d at 154. Plaintiffs argue that this formulation of the accrual rule applies to the facts of this dispute because *Pocahontas* is limited to cases in which the plaintiff discovered the injury and the pattern element simultaneously. Defendants' interpretation of *Pocahontas*, however, is unduly

---

7. *See also Bath v. Bushkin Gaims, Gaines, and Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990); *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F.2d 1546 (11 Cir. 1990), *cert. denied*, 111 S. Ct. 1695 (1991); *Keystone Insurance Co. v. Houghton*, 863 F.2d 1125, 1134 (3d Cir. 1988).

narrow. Nothing in *Pocahontas* explicitly restricts that opinion to its facts, and defendants have offered no authority to suggest that the *Pocahontas* rule should be so confined. In light of the clear mandate by the Fourth Circuit on this issue and the defendants' failure to distinguish *Pocahontas*, the Court concludes that the Fourth Circuit's accrual rule governs this dispute: Under *Pocahontas*, the Cherreys should have known by March, 1987 that the transaction had harmed them financially. Consequently, all of plaintiffs' RICO claims are barred because they accrued by March, 1987, over four years before the suit was instituted.

Defendant Philip Everson has moved to dismiss both the RICO claims and the pendent state tort claims solely based on plaintiffs' putative failure to state a claim upon which relief can be granted. Although he has failed to seek dismissal on statute of limitations grounds, it is clear that his RICO claims, like those of his codefendants, are time barred. The foregoing discussion demonstrates that all of the RICO claims against all of the defendants can not be maintained because they accrued over four years ago. A court loses its subject matter jurisdiction over an action once it becomes apparent that the claims are barred by the applicable statute of limitations. *See Richmond. F. & P. R. Co. v. U.S.*, 945 F.2d 765, 768 (4th Cir. 1991) *petition for cert. filed*, Jan. 17, 1992 (affirming the dismissal of an action on defendant's motion to dismiss for lack of subject matter jurisdiction because the statute of limitation barred the plaintiff~s claim). Under Fed. R. Civ. P. 12(h)(3), the Court may dismiss an action *sua sponte* whenever it appears that the Court lacks subject matter jurisdiction. Accordingly, the RICO claims against defendant Philip Everson shall be dismissed by order of the court for lack of subject matter jurisdiction.

Appendix B

B. Statute of Limitations for State Law Claims

Gerald Diaz, Baltimore Savings and Loan, and the Resnick defendants also argue in their motions to dismiss that plaintiffs' state law claims of fraud, negligent misrepresentation, legal malpractice, and conspiracy to defraud are barred by the three year statute of limitations in Maryland. Md. Cts. & Jud. Proc. Code Ann. § 5-101. It is not necessary, however, for the Court to reach the merits of this claim. In light of the dismissal of the RICO charges, the Court declines to exercise jurisdiction over the pendent state claims. *United States Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). The Court is of the opinion, however, that for reasons similar to those discussed above, the three year statute of limitations under Maryland law[8] would bar plaintiffs' tort claims.

IV. CONCLUSION AND ORDER

Accordingly, it is this 25th day of March, 1992, by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion to dismiss of defendant Gerald Diaz BE, and hereby IS, GRANTED; and

2. That the motion to dismiss of defendants Alleck Resnick, Resnick, Sopher, & Perlow, P.A., and Bay State Title Company BE, and hereby IS, GRANTED; and

3. That the motion to dismiss of defendant Baltimore Savings

---

8. *See* Md. Cts. & Jud. Proc. Code Ann. § 5-101.

and Loan Association, Inc. BE, and hereby IS, GRANTED; and

4. That the motion to dismiss of defendant Philip Everson BE, and hereby IS, GRANTED; and

5. That plaintiffs' motion for leave to amend complaint BE, and hereby IS, DENIED; and

6. That plaintiffs' motion to strike BE, and hereby IS, DENIED; and

7. That the Clerk of the Court shall mail a copy of this Memorandum and Order to all counsel of record.

s/ Norman P. Ramsey
Norman P. Ramsey
Senior U. S. District Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-91-1361

GEORGE CHERREY, et al.,

Plaintiffs,

v.

GERALD DIAZ, et al.

Defendants.

JUDGMENT ORDER

In accordance with the Memorandum and Order dated March 25, 1992, and filed in the above-captioned case, it is this 25th day of March, 1992, by the United States District Court for the District of Maryland,

ORDERED AND ADJUDGED:

That judgment be, and hereby is, entered in favor of the defendants and against the plaintiffs.

s/ Norman P. Ramsey
Norman P. Ramsey
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. R-91-1361

GEORGE CHERREY, et al.,

Plaintiffs

v.

GERALD DIAZ, et al.,

Defendants

ORDER

Pending before the Court in the above-captioned case is a motion to alter or amend judgment and a motion for leave to amend complaint, both of which were filed by plaintiffs George and Rathleen Cherrey. Plaintiffs ask the Court to vacate the judgment entered in favor of defendants on March 25, 1992 and to deny defendants' motion to dismiss plaintiffs' complaint. The Court entered final judgment against the Cherreys because the four year statute of limitations for RICO actions barred all of plaintiffs' RICO claims. *See Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987); *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987). Plaintiffs' motion to alter or amend judgment has no merit because the Cherreys can not remedy their lack of subject matter jurisdiction. Likewise, their motion to amend complaint must also be denied because none of the proposed amendments cure the underlying problem of the statute of limitations.

Appendix C

Accordingly, it is this 3rd day of April, 1992, by the United States District Court for the District of Maryland,

ORDERED:

1. That plaintiffs' motion to alter or amend judgment BE, and hereby IS, DENIED; and

2. That plaintiffs' motion to amend complaint BE, and hereby IS, DENIED; and

3. That the Clerk of the Court shall mail a copy of this Order to all counsel of record.

s/ Norman P. Ramsey
Norman P. Ramsey
Senior United States District Judge

Supreme Court, U.S.
FILED
AUG 10 1993
OFFICE OF THE CLERK

No. 93-76

In The

Supreme Court of the United States

October Term, 1993

GEORGE CHERREY, *et al.*,

Petitioners,

vs.

GERALD DIAZ, *et al.*,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF THE CASE

Petitioners entered into a contract to purchase investment real estate in December, 1986. Petitioners do not allege having any contact with this respondent until after the contract was signed. Petitioners closed on the sale in January, 1987 without first conducting a thorough inspection of the properties. They subsequently became dissatisfied with their investment. Petitioners took no legal action against respondents, however, until May 15, 1991, when they filed a civil RICO action claiming that some of the respondents made misrepresentations, upon which petitioners relied, as to the condition and value of the properties. The district court dismissed the complaint as time barred by the four-year statute of limitations adopted by this Court in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U. S. 143, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987), finding that the petitioners had knowledge of their injury, if any, more than four years prior to the filing of their complaint. The United States Court of Appeals for the Fourth Circuit affirmed.

Petitioners allege that in 1991 they learned for the first time that two other couples, who also claimed to have relied on alleged misrepresentations by the respondents, had also purchased real estate from them without first conducting a thorough inspection. Petitioners contend that their claimed discovery of similar alleged injuries to *others* should resuscitate their causes of action.

SUMMARY OF ARGUMENT REASONS FOR DENYING THE WRIT

The conflicts of decisions asserted in the Petition for Writ of Certiorari, when properly understood, are not genuinely at odds with the holding in the instant case. Petitioners' case turns on its own specific facts, and no amount of sophistry can convert it into one warranting review on certiorari. The decision of the court of appeals in the case at bar is in accord with all other decisions by a court of appeals in which a similar factual issue has been presented. Even if there were a conflict, the acts alleged in the petitioners' Amended Complaint fail to state a claim under RICO, and the judgment for which petitioners seek review is therefore amply supported on grounds other than limitations.

ARGUMENT

Petitioners concede that the law in the First, Second, Fourth, Seventh and Ninth Circuits, which hold unequivocally that the statute of limitations in a civil RICO action accrues at the time plaintiffs know or should know of their injury, bars their claims. Petitioners argue, however, that conflict exists among the circuits because cases in the Third, Eighth, Tenth and Eleventh Circuits hold that the statute of limitations in civil RICO actions accrues when the plaintiffs know or should know of both their injury and the defendants' pattern of racketeering. Petitioners then attempt to bootstrap themselves into the discovery of a "pattern" by claiming their discovery of similar

allegations by others should start their own limitations period running anew.

A. None of the cited cases presents a conflict.

Petitioners refer to several cases in support of their contention that an irreconcilable conflict exists among the circuits: *Glessner v. Kenny*, 952 F. 2d 702, 706 (3d Cir. 1991); *Granite Falls Bank v. Henrikson*, 924 F. 2d 150, 154 (8th Cir. 1991); *Bath v. Bushkin, Gaims, Gaines and Jonas*, 913 F. 2d 817, 820 (10th Cir. 1990), *abrogated on other grounds, Lampf, Pleva, Lipkind, Prupis & Pettigrow v. Gilbertson*, 111 S. Ct. 2773, 2777 n.1, 115 L. Ed. 2d 321 (1991) and *Bivens Gardens Office Building, Inc. v. Barnett Bank of Florida, Inc.*, 906 F. 2d 1546, 1554-55 (11th Cir. 1990) *cert. denied*, 111 S. Ct. 1695 (1991). Petitioners make no attempt to apply the law in these cases to the facts of their cases, however. When limited to their facts, none of the cases alluded to in the Petition for Writ of Certiorari presents a conflict with the decision for which petitioners seek review.

In *Glessner, supra*, plaintiffs purchased allegedly defective furnaces between 1975 and 1984 and filed suit in 1988. The court of appeals affirmed the dismissal of their RICO claim, holding that it was time barred because, *inter alia*, "this injury was admittedly known to these plaintiffs before [four years before suit was filed]," 952 F. 2d at 707.

In *Granite Falls, supra*, the court of appeals adopted the standard of accrual announced in *Bivens, supra*. The *Granite Falls* court reversed and remanded a case dismissed as time-barred, stating, "the question remains open on remand, after evidentiary development, whether

under [the *Bivens* rule] the Bank's RICO claims are time barred because the Bank either did discover, or reasonably should have discovered, these claims more than four years prior to the commencement of this action," 924 F. 2d at 155.

Bivens involved allegations that several different harms were allegedly committed by defendants over a period of eight years against various victims. One of the victims, Konstand, filed a state court action against the RICO defendants in 1975 that revealed he knew then that he had been the victim of multiple fraudulent acts at the hands of defendants. The federal court of appeals therefore held that his RICO action, filed more than four years later, was time-barred.

Similarly, in the case at bar, petitioners' Amended Complaint reveals that they knew, no later than 1987, that they had not fully inspected the properties and of the other acts of respondents about which they complain – representations as to the value of the property, the condition of the property, etc. The fact that other alleged victims may have had different states of knowledge regarding their own alleged victimization is not dispositive of when petitioners' claims accrued, even under *Bivens*. That court found it appropriate to analyze "when *each* plaintiff knew or should have known that his injuries were the result of a pattern of racketeering activity when determining when *each* plaintiff's civil RICO cause of action began to accrue," 906 F. 2d at 1554 (emphasis added). Under this test, petitioners' claims would be time barred, even though the claims of the other alleged victims, who purchased their property in later years, might not be.

Bivens acknowledged that in a case involving an injury that occurred only on one occasion, the rule announced in *Bowling v. Founders Title Co.*, 773 F. 2d 1175, 1178 (11th Cir. 1985), *cert. denied sub nom. Zoldessy v. Founders Title Co.*, 475 U. S. 1109, 106 S. Ct. 1516, 89 L. Ed. 2d 915 (1986) would be instructive. In *Bowling*, several different plaintiffs were injured when a buyer failed to close on a real estate transaction. The court held that the RICO cause of action accrued as to each plaintiff when that particular plaintiff discovered that the transaction had fallen through. Using this approach, the result would be consistent with that reached by the court of appeals in the decision for which review is sought: the time when respondents' other alleged victims purchased their property would determine when the *other* victims' claims accrued – not petitioners'.

In *Bath, supra,* the court of appeals reversed and remanded a dismissal based on limitations for a determination of the RICO accrual time, but stated that the time the injury and pattern were identified is not made irrelevant by identifying one predicate act that occurred within four years of the filing. 913 F. 2d 821, n.2. The district court in the case at bar found that petitioners knew several months before May, 1987 of their injury; the Amended Complaint alleges that the pattern of acts of respondents occurred before or at the time of closing in January, 1987. Suit was not filed until May 1991. Petitioners' claims are therefore time barred under *Bath.*

Even the court adopting the most expansive accrual rule,[1] *Keystone Ins. Co. v. Houghton,* 863 F. 2d 1125 (3d Cir. 1988), which is not cited by petitioners, admits the simple discovery of the injury rule adopted by the majority of the circuits is the appropriate one to use, where, as here, the alleged RICO violation has just one victim. "The simple discovery rule is an effective rule where the facts indicate that there was one victim and each element and all predicate acts of a RICO violation were present at the same time. It is only in the case where multiple victims, or multiple injuries or predicate acts extending over a period of time are present that the rule we announce is different in application from the simple discovery rule," 863 F. 2d at 1133.

Before *Agency Holding, supra,* various circuits dealt with the absence of a civil RICO statute of limitations by "borrowing" from various other "analogous" statutes, resulting in much inconsistency and uncertainty. This Court ended the controversy by borrowing the limitations period of the Clayton Act. One court has taken the next logical step by examining the Clayton Act's perspective on the accrual issue we face in the case for which review is sought. The court concluded,

> The Clayton Act, as far as we are aware, starts the statute running once a particular plaintiff realizes that he has been overcharged because of

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[1] The sixth circuit observed in *Agristor Financial Corp. v. Van Sickle,* 967 F. 2d 233, (6th Cir. 1992), that "... under [the *Keystone*] rationale, in certain cases where the illegal activity is allegedly continuous, the statute of limitations will never begin to run. This conflicts with the public policy of repose which is the source of such statutes in the first place," 967 F. 2d at 241.

> price-fixing; the fact that the *same* conspiracy may, at a later time, have injured someone else does not postpone the first plaintiff's accrual date. Assume, for example, that buyers of, say, plumbing supplies realize, say in 1980, that a price-fixing conspiracy has raised the price of the fixtures they have bought. Assume further that the same plumbing conspirators, as part of the same conspiracy, raise the price of plumbing fixtures sold to *different* buyers in, say 1990. We are aware of no case, nor any other legal authority, that would suggest that the limitations period applicable to the *first* group of buyers does not begin to run until 1990, when the *second* group is injured.

Rodriguez v. Banco Central, 917 F. 2d 664, 666 (1st Cir. 1990). Petitioners speculate that some circuits would allow the limitations period applicable to the first group of buyers begin to run after the second group is injured if this hypothetical case were brought in the context of a civil RICO action. But as a careful examination of the cases reveals, no case has so held, and no conflict exists among the circuits that have addressed that type of factual scenario.

B. Even if a conflict does exist, the judgment for which review is sought is supported on other grounds.

Recognizing that their civil RICO claim for injuries caused by alleged misrepresentations to them in connection with the purchase of their investment properties was time barred under any test, petitioners tried to reset the limitations clock by finding another person with a similar

problem. Such allegations, even if true, however, do not rise to the level of RICO "pattern." A RICO "pattern" must include a "continuity prong" as well as "specific allegations showing a distinct threat of continuing racketeering activity," *Myers v. Finkle*, 950 F. 2d 165, 169 (4th Cir. 1991). Neither of these elements is alleged in the case at bar. The fact that other purchasers may have failed to inspect thoroughly their properties, or may have relied on alleged puffery by or opinion of a seller, does not constitute a RICO "pattern."

Moreover, petitioners failed to allege sufficient facts to state a claim for fraud, constructive fraud, or civil RICO violation, against this respondent. There is no allegation that this respondent, a bank, did anything to induce petitioners to enter into their contract with sellers. In fact, the Amended Complaint claims that the alleged wrongdoings of the respondent bank were made at closing, *after* petitioners had already entered into the binding contract of sale. In Maryland, the relationship of a bank to its customer is contractual, not fiduciary. *Yousef v. Trustbank Savings, F. S. B.*, 81 Md. App. 527, 568 A. 2d 1134 (1990). Consequently, there can be no greater duty attached to this respondent than that contained in the contractual documents, and no such breach is alleged.

Finally, ample grounds other than limitations exist in the record to support the judgment for which review is sought, although they were not relied upon by the lower courts. These grounds are contained in the motions to dismiss, memoranda in support thereof and in reply memoranda filed by respondents in the district court, and made a part of the appendix to brief of appellant in the court of appeals.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 93-76

Supreme Court, U.S.
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AUG 13 1993
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

GEORGE CHERREY, *et al.*,
Petitioners,

v.

GERALD DIAZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

When does a civil RICO cause of action under 18 U.S.C. § 1964(c) accrue for the purposes of the four year statute of limitations adopted in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987)?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-76

GEORGE CHERREY, *et al.*,
Petitioners,

v.

GERALD DIAZ, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Alleck Resnick, Resnick, Sopher & Perlow, P.A. and Bay State Title Company, Respondents,* respectfully pray that the Petition for a Writ of Certiorari submitted by George Cherrey and Kathleen Cherrey be denied.

COUNTER STATEMENT OF THE CASE

Petitioners George Cherrey and Kathleen Cherrey ("the Cherreys") brought suit arising out of their purchase of various rental properties in Baltimore City. The properties were purchased from Respondents Gerald Diaz ("Diaz") and Philip Everson ("Everson"). Respondents Alleck Resnick ("Resnick") and Resnick, Sopher & Perlow, P.A. ("RS&P") were the settlement attorneys who conducted the closing on the sale of the properties. Bay

---

* There are no parent companies or subsidiaries relating to Resnick, Sopher & Perlow, P.A. or to Bay State Title Company.

State Title Company ("Bay State") was the guarantee company and Baltimore Savings and Loan Association, F.A. was the mortgagee.

The Cherreys originally responded to a newspaper advertisement advising of the availability of the rental properties for sale. The complaint alleged that Diaz represented that the properties were in good condition, well maintained, continuously rented and inhabited by stable tenants. It also alleged that Diaz promised to repurchase the properties and to assume the mortgages taken out as part of the transaction if the Cherreys had any problems. Without having fully inspected the properties, the Cherreys signed a contract on December 30, 1986. The closing took place on January 30, 1987.

The complaint alleged that in May, 1987, as the original tenants began vacating the properties, the Cherreys came to realize that the condition of the houses did not comport with the representations made by Diaz, nor with the local housing code. However, it was acknowledged in the complaint that one of the properties was vacant from the closing on January 30, 1987 through March, 1987. Despite the vacancy, the Cherreys took no action to inspect this or any of the other properties.

The Cherreys instituted suit on May 15, 1991, after they allegedly became aware of two other couples claiming to have similarly relied on alleged misrepresentations by Diaz and/or Everson relating to the purchase of rental properties in Baltimore City. The suit filed by the Cherreys alleged a civil claim under the Racketeering Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), and various state law claims. However, the district court, in an unpublished decision, dismissed the complaint based on the four year statute of limitations for civil RICO actions adopted in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987). The district court held that the civil RICO claim expired prior to the May 15, 1991 filing of the complaint because the Cherreys should have discov-

ered their alleged injury at least by March, 1987, while the one property remained vacant. The United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") affirmed in an unpublished, *per curiam* opinion.

SUMMARY OF ARGUMENT

Given the facts and circumstances surrounding this case, no "special and important reasons" exist which merit the Court's review. Furthermore, the alleged facts do not otherwise properly state a claim under RICO and dismissal of the complaint was therefore also warranted on grounds independent of the statute of limitations.

ARGUMENT

Supreme Court Rule 10.1 provides, in pertinent part, as follows:

> A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Sup. Ct. R. 10.1. The Court should deny the Cherreys' Petition because there are no "special and important reasons" to review this case.

This case involves a dismissal of a private, civil RICO claim on limitations grounds. The decision of the district court was unpublished, as was the Opinion of the Fourth Circuit which affirmed *per curiam*. Under the facts alleged in the complaint and necessarily assumed as true by the lower courts, the Cherreys purchased various rental properties virtually sight unseen based on misrepresentations made by the sellers, including the open-ended promise by the sellers that they would rescind the deal should the Cherreys have any problems in the future. The Cherreys thereafter failed to inspect the properties in a timely fashion, even though one of the properties remained vacant for months after the closing.

In addition, the Cherreys entered into a binding contract to purchase the properties on December 30, 1986. At that time, the Cherreys had never met or otherwise had any contact with any of the Respondents, with the exception of the sellers, Diaz and Everson. Nevertheless, the Cherreys sued Resnick, RS&P and Bay State based on vague and conclusory allegations that they were somehow involved in a scheme to defraud. The RICO aspect of the claim arises merely out of the Cherreys' alleged, subsequent discovery of two other couples who claim to have been defrauded in a similar fashion.

Given the facts and circumstances underlying the Cherreys' RICO claim, it cannot be seriously argued that this case presents "special and important reasons" which warrant the Court's attention and review. Even assuming a split in the circuit courts of appeal on the accrual issue, this case simply does not present the proper forum for that issue to be decided. It would clearly be inappropriate in this context to consider the massive and unwarranted expansion of civil RICO liability contemplated by the Cherreys.

Moreover, the dismisal of the Cherreys' RICO claim is supported on grounds independent of the statute of limitations. These additional grounds were included in the briefing papers submitted in support of the motions to dismiss filed by the various Respondents.

In particular, the complaint failed to allege any facts supporting the underlying claims of mail fraud and wire fraud against Resnick, RS&P and Bay State. Furthermore, the Cherreys had already entered into the contract to purchase the rental properties before ever having had any contact with Resnick, RS&P and Bay State. It therefore cannot be argued that Resnick, RS&P or Bay State somehow fraudulently induced the Cherreys to enter into the contract.

The complaint also failed to sufficiently allege a "pattern of racketeering activity." A "pattern of racketeering activity" requires the commission of at least two predicate

racketeering acts within the last 10 years. *See* 18 U.S.C. § 1961(5). Additionally, in order "to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (emphasis in original); *see Myers v. Finkle*, 950 F.2d 165, 169 (4th Cir. 1991).

The Cherreys' reliance upon the claims of the two other couples to prove its RICO claim is misplaced. Those isolated, alleged events do not establish the existence of related predicate acts. They also do not suggest the threat of continued criminal activity. The allegation that these other couples may have likewise failed to properly inspect the subject properties or unreasonably relied upon representations by the sellers simply does not constitute a RICO "pattern."

CONCLUSION

For the reasons set forth above, Alleck Resnick, Resnick, Sopher & Perlow, P.A. and Bay State Title Company, Respondents, respectfully request that the Petition of George Cherrey and Kathleen Cherrey for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

Respectfully submitted,

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No. 93-76

In The

Supreme Court of the United States

October Term, 1993

GEORGE CHERREY, *et al.*,

Petitioners,

v.

GERALD DIAZ, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY TO BRIEFS IN OPPOSITION

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REPLY TO BRIEFS IN OPPOSITION

Pursuant to U.S. Sup. Ct. Rule 15, 28 U.S.C. (1993), Petitioners George and Kathleen Cherrey ("the Cherreys") hereby submit their reply to the briefs in opposition filed in this matter by Respondents Alleck Resnick, Resnick, Sopher & Perlow, P.A. and Bay State Title Company ("Resnick Respondents") and Respondent Baltimore Savings & Loan Association, F.A. ("BS&L").

I. REPLY TO BRIEF IN OPPOSITION OF THE RESNICK RESPONDENTS

The Resnick Respondents commence their arguments with the following:

> Supreme Court Rule 10.1 provides, in pertinent part, as follows:
>
> > A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.
>
> Sup. Ct. R. 10.1. The Court should deny the Cherreys' Petition because there are no "special and important reasons" to review this case.

Resnick Respondents' Brief at 3.

However, the above is a quotation out of context. Immediately after the material quoted above, Rule 10.1 proceeds with the following:

> The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. . . .
>
> * * *
>
> (c) When a . . . United States court of appeals . . . has decided a federal question in a way that conflicts with the applicable decisions of this Court.

The Petition tendered by Petitioners herein is predicated on both of these special and important reasons. As noted in the Petition at 5 and 6, the court below explicitly acknowledged that there was a conflict among the Circuits. And, finally, as this Court has recently ruled, to eliminate a conflict among the Circuits regarding the limitation period for a federal statute, is alone sufficiently important to warrant *certiorari*. *Lampf, Pleva, Lipkind, Prupis and Petrigrow v. Gilbertson*, ___ U.S. ___, 115 L.Ed.2d 321, 330 (1991). Accordingly, Respondents' argument is frivolous.

At pages 4 and 5 of their brief, the Resnick Respondents raise issues that were neither presented to, nor passed upon by, the Fourth Circuit in the decision below. Respondents allege:

> [T]he Cherreys sued Resnick, RS&P and Bay State based on vague and conclusory allegations that they were somehow involved in a scheme to defraud. The RICO aspect of the claim arises merely out of the Cherreys' alleged, subsequent discovery of two other couples who claim to have been defrauded in a similar fashion.

Resnick Respondents' Brief at 4.

They also allege that the dismissal of the RICO claim is supported on a number of different "independent" grounds; most particularly, that citation to the other victims is insufficient to allege a "pattern of racketeering activity." *Id.*

However, these arguments ignore the law and misrepresent the facts. As noted above, these arguments were never presented to, nor passed upon by, the Fourth

Circuit below and, accordingly, are improperly advanced by the Respondents. *Lytle v. Household Manufacturing*, 494 U.S. 545, 551 n.3 (1990); *Youakim v. Miller*, 425 U.S. 231, 234, (1976); *California v. Taylor*, 353 U.S. 553, 557 n.2 (1957).

More significantly, the Respondents' allegations totally misrepresent the facts. Appendix A attached hereto contains relevant pages of the Cherreys' complaint filed below. As shown therein, the complaint named as other victims in the pattern of racketeering activities, brothers Anthony and Michael Munafo, Paul and Ronald Maas and Paul Maas' wife Donna Maas, and Patsy and Daniel Hoag. As a result, four separate complaints were filed involving essentially the same fraudulent scheme and pattern of racketeering activities: *Cherrey, et al. v. Diaz, et al.*, No. R91-1361; *Munafo, et al. v. Diaz, et al.*, No. R91-1359; *Maas, et al. v. Diaz, et al.*, No. 91-1360; and *Hoag, et al. v. Diaz, et al.*, No. R91-2642.

The Respondents filed motions to dismiss below, alleging statute of limitations violations in all but the *Hoag* proceeding. Moreover, the motions to dismiss contained all the other "independent" grounds, including the allegation that the complaints were "vague and conclusory," as Respondents alleged above, and similarly, that the complaints did not sufficiently allege a "pattern of racketeering activity." The district court granted the motions to dismiss on statute of limitation grounds in the Cherrey and Maas complaints, which were later appealed to the Fourth Circuit in that court's proceeding below. However, the district court denied the motions to dismiss the Munafo and Hoag complaints, specifically rejecting, *inter alia*, the Respondents/Defendants' allegations that

the complaints were too vague and conclusory[1] and did not sufficiently allege a pattern of racketeering activities. *See* relevant pages of the district court decisions contained in Appendix B attached hereto.

Accordingly, not only do the Respondents' allegations ignore the decisions of this Court, they misrepresent the facts as well.

II. REPLY TO BRIEF IN OPPOSITION OF RESPONDENT BS&L

Respondent BS&L tenders two reasons for denying the writ. One is essentially the same as the latter reason of the Resnick Respondents addressed above: that dismissal is supported by independent grounds other than limitations, including that the RICO "pattern" was not sufficiently alleged. However, as noted above, these independent grounds were rejected by the district court. Accordingly, this position too both ignores the decisions of this Court and misrepresents the facts below.

BS&L's other argument is its allegation that there is no conflict among the Circuits; and

> [N]o amount of sophistry can convert [the Petition] into one warranting review on certiorari. The decision of the court of appeals in the case at bar is in accord with all other decisions by a

---

[1] The Cherrey complaint was 46 pages long and contained 185 paragraphs, and the Respondents characterizing it as "vague and conclusory" is ludicrous on its face.

> court of appeals in which a similar factual issue has been presented.

BS&L's Brief at 2.

The Respondent does not cite what portion of the Petition is "sophistry." The bulk of the reasons for granting the writ tendered by the Petitioners was simply a quotation of the Fourth Circuit decision below wherein the Fourth Circuit acknowledged that there exists a conflict among the Circuits. Indeed, even the district court, in granting the motion to dismiss, stated: "The circuits are currently split over the proper method of determining when a RICO claim accrues." *See* Petition, Appendix B, at 11A. If, as the Respondent appears to be arguing, it is "sophistry" to conclude that there is a conflict among the Circuits on this issue, then Petitioners proudly stand with our fellow sophists, the honorable judges of the district and circuit courts below.

Neither the district court nor the Fourth Circuit below rejected the Petitioners' allegation that they did not discover (and reasonably could not have discovered) that they were victims of a RICO "pattern" of racketeering activities until they became aware in January of 1991 that the Respondents had similarly defrauded the seven other victims cited above. The courts simply ignored the pattern element, based on their view that the only relevant issue was the discoverability of the injuries. Nonetheless, the decision below makes its clear that the decisions of the Third, Eighth, Tenth and Eleventh Circuits, would not have time-barred the Petitioners' complaint.

Respondent BS&L, however, challenges the decision below and alleges that there is no conflict among the circuits; and, at pages 3-7, attempts to show, by citing portions out of context of the decisions of those other circuits, that there is no conflict. To fully show that these citations are indeed out of context would take more than the ten pages here permitted. Instead, Petitioners will merely restate the ultimate findings of those decisions, which the Fourth Circuit acknowledged were in conflict with its rulings below: pursuant to the decisions of the Third, Eighth, Tenth and Eleventh Circuits, the limitation period for RICO causes of action does not begin to accrue until the plaintiff has (or should have) discovered *both* the injury and the pattern; and, in this case, that accrual would have commenced in January 1991.

However, there is one example of Respondent's case arguments which Petitioners can address within the page restrictions, and which also provides a good overview. At 3-4, Respondent suggests that the *Granite Falls* decision was not in conflict with the decision below:

> In *Granite Falls, supra,* the court of appeals adopted the standard of accrual announced in *Bivens, supra.* The *Granite Falls* court reversed and remanded a case dismissed as time-barred, stating, "the question remains open on remand, after evidentiary development, whether under [the *Bivens* rule] the Bank's RICO claims are time barred because the Bank either did discover, or reasonably should have discovered, these claims more than four years prior to the commencement of this action," 924 F.2d at 155.

However, compare this with the argument Respondent/Appellees advanced regarding the *Granite Falls* decision in their brief to the Fourth Circuit below:

> 2. *The Granite Falls Decision.*
>
> The United States Court of Appeals for the Eighth Circuit adopted an accrual rule which is joined only by the United States Courts of Appeals for the Third, Tenth, and Eleventh Circuits. These courts resolved the accrual issue by applying a discovery rule to the pattern element, as well as to the injury requirement of a civil RICO cause of action. The rationale that the Eighth Circuit adopted is:
>
> > With respect to each independent injury to the plaintiff, a civil RICO cause of action begins to accrue as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.
>
> *Granite Falls v. Henrikson*, 924 F.2d 150, 153-54 (8th Cir. 1991).
>
> Despite the contentions of the Maas' and the Cherreys to the contrary, the accrual rule in this Circuit is, in fact, different. . . .

Brief of Appellees at 10-11, *Cherrey, et al. v. Diaz, et al.*, No. 92-1524, *et al.* (4th Cir. 1992).

Whether or not the Respondent's arguments should be characterized as "sophistry," there is no question as to their inconsistency.

III. CONCLUSION

As presented in the Petition herein, and as further addressed in this reply, the most important and principal reasons for the exercise of this Court's *certiorari* jurisdiction are existent in this proceeding. There is a clear conflict among the Circuits, and the Circuits are so evenly split, as to create the clear danger of the forum shopping which was condemned in this Court's decision in *Agency Holding Corp. v. Malley-Duff & Associates, Inc.*, 483 U.S. 143, 154 (1987).

Moreover, the position of the Fourth Circuit below, as well as the First, Second and Seventh Circuits, are clearly in conflict with both the intent of Congress and this Court's decision in *Malley-Duff* above: "The heart of any RICO complaint is the allegation of a *pattern* of racketeering," 483 U.S. at 154 (emphasis in original). Allowing the limitations periods to accrue when only injury is known, and not the pattern of racketeering, means that Petitioners and others similarly situated could be time-barred before they were aware that they could commence an action. This, obviously, "would thwart the legislative purpose of creating an effective remedy." *Malley-Duff*, 483 U.S. at 154.

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September 16, 1993

APPENDIX A

Relevant Pages Of The Complaint Below

* * *

[p. 21] Balt. S&L previously set out were done in furtherance of the conspiracy.

85. The conspiracy to defraud the Cherreys caused damage to the Cherreys.

OTHER VICTIMS

86. On or about April 4, 1988, brothers Anthony and Michael Munafo ("the Munafos") saw an advertisement in *The Baltimore Sun* for buying rental properties. The advertisement said the properties were in excellent condition.

87. Michael Munafo called the telephone number in the advertisement. In a series of approximately three telephone calls between on or about April 5, and April 19, 1988:

A) Michael Munafo explained that he had never owned any real property and did not have a car and therefore was interested only in property that was easy to manage;

B) Diaz said he and Shannon Turner ("Turner") had three rental properties for sale in downtown Baltimore, 203 S. Woodyear Street, 216 S. Bruce Street and 324 S. Bruce Street;

C) Diaz said the properties were easy to manage;

D) Diaz said he and Turner had owned the properties for years and were selling now because the tax depreciation benefits had ended and they were liquidating a partnership;

E) Diaz said the properties were easily rented;

F) Diaz said the properties were in good condition;

* * *

114. On or about April 6, 1986 brothers Paul and Ronald Maas saw an advertisement in *The Baltimore Sun* that advertised investment rental properties for sale. On or about April 6 Paul Maas called the telephone number in the advertisement and Diaz said he was liquidating a partnership and had properties for sale.

115. On or about April 7 or 8, 1986, Everson made a telephone call to the Paul Maas residence and spoke to his wife, Donna Maas. Everson said he wanted to set up an appointment to inspect the properties.

116. On or about April 8, 1986, Paul Maas returned the telephone call and spoke to Diaz on the telephone. Diaz and Paul Maas then arranged a meeting to view the properties.

117. At the meeting, which occurred in Everson's red Cadillac, Diaz and Everson told the Maases:

A) They were selling because they had exhausted the tax depreciation from the properties and were liquidating a partnership because they were getting out of the rental property business;

B) They had owned the properties for years;

C) The properties had always been easily rented and they never had any problems renting the properties;

D) The tenants were long-term, stable tenants and they only had one eviction in the years they had owned the properties;

E) Their rental history was so good they would guarantee the first month's rent to the Maases;

F) All the properties met all housing codes;

* * *

and Donna Maas at 12 Ayr Court in Baltimore County, in return for which Diaz and Everson agreed to release their second mortgages on the properties in the first package.

150. On or about November 13, 1990, the Maases sold 2658 Frederick Avenue to Spence for $10,000 and sold 308 South Norris to Spence for $6800. The Maases paid this $16,800, plus approximately $7500 additional to Spence, in return for which Spence released his first mortgage on 210 and 308 South Norris Street, 2658 Frederick Avenue and 6409 Eastbourne Avenue.

151. The results of these deals, which were forced on the Maases because of the excessive purchase prices for the properties induced and caused by the frauds, was large financial losses for the Maases. In each of the years from 1986 to 1991 the Maases paid substantial amounts of money and expended substantial amounts of time to repair and renovate the properties, just to place them in the condition represented by Diaz and Everson.

152. Counsel for Diaz mailed a letter dated April 5, 1991 to the Maases. The letter stated that the Masses owed Diaz over $38,000 for two mortgages on the properties and stated that foreclosure proceedings would be instituted if the amounts were not paid in full by the due dates of the five year balloon, i.e., May 16, 1991 and May 27, 1991.

153. Resnick, on behalf of Balt. S&L, mailed a letter dated May 1, 1991 to the Maases, stating that the Maases were late making their April mortgage payment to Balt. S&L and that he would begin a foreclosure action on May 15, 1991 if the delinquency was not cured.

154. On or about February, 1989, Patsy Hoag read an advertisement in either *The Baltimore Sun* or the *Enterprise* advertising rental properties for sale as investments. [p. 38] She spoke to Diaz who told her:

A) He had a rental property for sale;

B) He was selling because he had exhausted the tax depreciation benefits and was liquidating a partnership;

C) He had owned the property for years;

D) The property was in good condition;

E) The tenant had just moved out of the property and he would have another tenant in place by the time of settlement; and

F) The property was easy to rent and he had it rented continually for $375 per month, plus utilities.

155. Between the time of the initial telephone conversation and on or about February 23, 1989, Patsy Hoag

and Diaz had several conversations, both on the telephone and in person. During those conversations Diaz told Patsy Hoag:

A) The address of the property was 1615 Olive Street in the City of Baltimore;

B) The property was in good condition and met all housing codes;

C) The property had been appraised;

D) He had owned the property for years and was selling now because the tax depreciation benefits were exhausted; and

E) The property was easy to rent and he had rented it continuously for $375 per month, plus utilities.

156. On or about February 23, 1989, Patsy Hoag agreed to purchase 1615 Olive Street from Diaz, trading as Frederick Investment Partnership, for $18,500. Daniel [p. 39] Hoag signed the agreement, assenting to act as guarantor of the mortgage.

157. On or about early May, 1989, Patsy Hoag contacted Balt. S&L and asked if she could choose the lawyer for the closing. Balt. S&L said they would choose the attorney to perform settlement.

158. Settlement on the property occurred on or about May 16, 1989. The February 23, 1989 agreement with Diaz specified that the loan would be for fifteen years. The loan tendered by Balt. S&L had a five year balloon. When Patsy Hoag asked Diaz about this, he said not to worry, Balt. S&L would roll over the loan at the end of five years. At the closing Resnick gave papers to

the Hoags so fast they did not have an opportunity to read them. The Hoags believed Resnick was acting as their attorney at the closing and was acting for their benefit at the settlement.

159. After the closing Patsy Hoag discovered that 1615 Olive Street was not in good condition as represented by Diaz. She found that the heating ducts were not connected to the registers, there were structural defects in the joints and beams under the kitchen which caused the kitchen floor to sag, the furnace and stove had to be replaced and the bathroom windows did not fit and had to be replaced. The Hoags spent in excess of $3000 repairing and renovating the property, plus spending a substantial amount of time, just to repair some of the problems that Diaz claimed the property did not have.

160. Diaz lied when he said he had the property was rented continually at $375 per month. The property usually was vacant and the market rate in that area for properties in the condition of 1615 Olive Street was about $200 per month. Diaz did not have a tenant in the property at the time of settlement.

161. The Hoags mailed monthly mortgage checks to Balt. S&L from 1989 to

* * *

APPENDIX B

Relevant Pages Of The District Court Decisions

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

ANTHONY MUNAFO, et al.,	:	
Plaintiffs	:	
	:	CIVIL ACTION
v.	:	NO. R-91-1359
GERALD DIAZ, et al.,	:	
Defendants,	:	

MEMORANDUM AND ORDER

Pending before the Court in the above-captioned case are several motions filed by plaintiffs Anthony and Michael Munafo and defendants Gerald Diaz, Shannon Turner, and HRL, Inc. (the "Diaz defendants") and Alleck Resnick, Resnick, Sopher & Perlow, P.A., and Bay State Title Company (the "Resnick defendants"). The Munafos have moved for leave to amend complaint, and none of the defendants oppose this motion. The Diaz defendants and the Resnick defendants have each filed a motion to dismiss. In addition to their opposition to a dismissal, plaintiffs have filed a motion to strike the reply brief of the Diaz defendants.[1] Finally, all the defendants have

---

[1] Because the motion to strike is not relevant to the central dispute between these parties and only concerns the technicalities of the filing of the Diaz defendants' reply, the Court shall deny the motion to strike and focus on the merits of defendants' motions to dismiss.

filed motions to stay discovery.[2] The issues have been briefed by counsel for both

* * *

[p. 7] actually purchased. Likewise, defendants have completely failed to allege or establish that plaintiffs knew or should have known of all the elements of all seven causes of actions before May 15, 1988 merely because they learned of the defective condition of 216 South Bruce Street sometime after May 5, 1988.

B. The RICO Claims

In 18 U.S.C. § 1964(c), RICO provides for a private federal cause of action based on injuries suffered as a result of conduct prohibited by 18 U.S.C. § 1962. Section 1962 prohibits (a) the use of income derived from a "pattern of racketeering activity" to acquire an interest in, to establish, or to operate an "enterprise;" (b) the acquisition or maintenance, of any interest in or control of an "enterprise" through a "pattern of racketeering activity;" (c) any "person" employed or associated with an "enterprise" from conducting the enterprise's affairs through a "pattern of racketeering activity;" and (d) conspiracy to commit (a), (b), or (c). Plaintiffs have sued defendants under each of these provisions, and both the Resnick

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[2] Defendant Gerald Diaz and the Resnick defendants have also filed motions to dismiss in two related cases, *Maas v. Diaz*, Civil Action No. R-91-1360, and *Cherrey v. Diaz*, Civil No. R-91-1361. They have requested a stay of discovery in each case pending disposition of the motions to dismiss. In light of the Court's disposition of the present motion, defendant's request is

* * *

defendants and the Diaz defendants have moved to dismiss on the grounds that the allegations in the complaint are insufficient to support the RICO claims.

In order to survive a motion to dismiss, a complaint setting forth a violation of § 1962(c) must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S. P. R. L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). In [p. 8] Count XI of their complaint, plaintiffs allege that the defendants, "while employed by or associated with enterprises engaged in and which affect interstate commerce, conducted and participated in the conduct of those enterprises affairs through patterns of racketeering activity." The complaint goes on to allege and define several distinct "enterprises," including (1) an association in fact of any two or more of the defendants, (2) defendant Bay State Title Company, (3) defendant Resnick, Sopher & Perlow, P.A., and (4) Baltimore Savings and Loan Association. Each enterprise is alleged to be involved in racketeering as well as in lawful activities independent of the racketeering, such as the sale of real estate and the practice of law. Finally, Count XI alleges that the defendants engaged in mail and wire fraud on numerous occasions over the course of at least four years.[4] In Counts XII, XIII, and XIV, the plaintiffs restate the elements alleged in support of the § 1962(c) claim in terms of "acquisition and operation" of the enterprises to state a claim under § 1962(a), "acquisition and maintenance" of an interest in the enterprises to state a claim

---

[4] These allegations are not merely conclusory, but incorporate the rather detailed allegations of fraudulent conduct which form the basis for the state law claims.

under § 1962(b), and conspiracy for purposes of § 1962(d).

In spite of the fact that these allegations facially satisfy the RICO pleading requirements, defendants argue that the complaint must be dismissed because plaintiffs have failed to properly allege the existence of a RICO "enterprise." As defined [p. 9] by statute, an "enterprise" is "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact, although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court has interpreted "enterprise" to mean "a group of persons associated together for a common purpose of engaging in a course of conduct," with the members "function[ing] as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Further, a RICO "enterprise must be "separate and apart from the pattern of activity in which it engages." *Id.* at 583. In other words, a RICO enterprise must have a distinct existence beyond what is necessary to commit the alleged racketeering activities themselves. *United States v. Tillett*, 763 F.2d 628, 631 (4th Cir. 1985).

After exploring the required attributes of a RICO enterprise at length, defendants argue that because plaintiffs have not demonstrated the existence of an appropriate enterprise by alleging each fact necessary to prove this part of their case, the complaint must be dismissed. This argument is misplaced in the context of a motion under Rule 12(b)(6).

Under F.R.C.P. 8,[5] all that is required is "a short and plain statement of the claim showing that the pleader is entitled to relief." "Under the liberal theory of notice pleading in the federal rules, a complaint need not state 'facts,' 'ultimate [p. 10] facts,' or 'facts sufficient to constitute a cause of action.' " *Wade v. Johnson Controls, Inc.*, 693 F.2d 19, 21 (2d Cir. 1982), quoting 2A J. Moore & J. Lucas, Moore's Federal Practice 8.13 at 8-101 (2d ed. 1983). Indeed, it is not even necessary that a complaint explicitly address each element of a claim – it is sufficient that an inference may be drawn that the elements exist, and that there are alleged sufficient facts to enable the defendant to frame a response. *See Walker v. South Cent. Bell Tel. Co.*, 904 F.2d 275, 277 (5th Cir. 1990); *United States v. Bonanno Organized Crime Family of La Cosa Nostra*, 683 F. Supp. 1411, 1439 (E.D.N.Y. 1988), *aff'd*, 879 F.2d 20 (2d Cir. 1989). After drawing all inferences in the light most favorable to the plaintiffs, it simply does not appear to a certainty that the Munafos will be unable to prove any set of facts that would establish a RICO enterprise.[6] Of

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[5] The special pleading requirements of Fed. R. Civ. P. 9(b) apply to predicate acts of wire or mail fraud in RICO cases, but the general requirements of Rule 8 apply to the remaining RICO elements.

[6] Plaintiffs have alleged several possible enterprise structures, and it is clear that not every alleged enterprise will support liability on the part of every defendant. The question on this motion, though, is merely whether any of the alleged enterprises could possibly support liability on the part of the defendants. Because at least one of these structures is composed entirely of individuals, the Court need not address the continuing vitality of the dictum in *Benard v. Hoff*, 727 F. Supp. 211, 215 (D. Md. 1989), to the effect that corporations cannot associate in

course, were this case before the Court on a motion for summary judgment, the plaintiffs would have to show affirmatively that a *particular* enterprise existed, and that it bore an appropriate relation to the defendants to support liability.

[p. 11] C. The State Law Claims

Plaintiffs also claim that defendants' conduct gives rise to liability under theories of fraud, fraud by nondisclosure, constructive fraud, negligent misrepresentation, and conspiracy to defraud. The Resnick defendants attack these claims on the grounds that the allegations do not plead fraud with the specificity required by Fed. R. Civ. P. 9(b). That rule provides:

> In all averments of fraud and mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

In *Windsor Associates v. Greenfeld*, 564 F. Supp. 273 (D. Md. 1983), Judge Miller held that the term " '[c]ircumstances' refers to such matters as 'the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [was] obtained thereby.' " *Id.* at 280, quoting C. Wright and A. Miller, *Federal Practice and Procedure*, § 1297 at 400-403. Under *Windsor*, the requirements of Rule 9(b) are satisfied if the complaint contains enough "particulars to

---

fact to form an enterprise. For the same reason, the fact that the defendants cannot be both the "person" (i.e. defendant) and the "enterprise" for purposes of § 1962(c) is not dispositive here.

apprise defendants of the scheme they allegedly devised to defraud plaintiffs, the acts allegedly undertaken pursuant to that scheme, and what was obtained thereby." *Id.* It is simply not necessary, as defendants apparently contend, that a complaint allege specific facts sufficient to prove each element of these cause of action.

[p. 12] In their complaint, plaintiffs allege ample facts to set forth a scheme on the part of the defendants to defraud them during the course of a particular transaction. The complaint lists several allegedly false statements and intentional omissions made by Resnick on the defendants' behalf at the closing, and alleges that these false statements and omissions induced the plaintiffs to enter into an unfavorable transaction, causing them damages. Further, plaintiffs allege scienter on the part of the defendants.

These allegations satisfy the requirements of Rule 9(b), and are sufficient to survive a general attack under Rule 12(b)(6). As noted above, the present posture of the case limits the Court's review to the bare legal sufficiency of the allegations, and the Court expresses no opinion as to whether the alleged statements and omissions would support a tort action when viewed under the standards applicable to a motion for summary judgment.

Accordingly, it is this 17th day of March, 1992, by the United States District Court for the District of Maryland,

ORDERED:

1. That the motion to dismiss of defendants Gerald Diaz, Shannon Turner, and HRL, Inc. BE, and hereby IS, DENIED; and

2. That the motion to dismiss of defendants Alleck Resnick, Resnick, Sopher, & Perlow, P.A., and Bay State Title Company BE, and hereby IS, DENIED; and

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PATSY HOAG, et al.,	:	
Plaintiffs	:	CIVIL ACTION NO. R-91-2642
v.	:	
GERALD DIAZ, et al.,	:	
Defendants	:	

MEMORANDUM AND ORDER

Pending before the Court in the above-captioned case is defendant Baltimore Savings and Loan's motion to dismiss and request for sanctions.[1] The issues have been briefed by counsel for both sides, and the Court will rule without a hearing pursuant to Local Rule 105.6 (D. Md. 1989). For the reasons set forth below, defendant's motion will be denied.

Background

Plaintiffs, Patsy and Daniel Hoag, are in the business of investing in real estate. Defendant Gerald Diaz is a licensed real estate broker. Defendant Alleck Resnick, Esq., is a principal in defendant Resnick, Sopher & Perlow, P.A., and is also the treasurer of defendant Baltimore

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[1] Baltimore Savings has also filed motions to dismiss in two related cases, *Maas v. Diaz*, Civil Action No. R-91-1360, and *Cherry v. Diaz*, Civil No. R-91-1361. It has requested a stay of discovery in each case pending disposition of the motions to dismiss. In light of the Court's disposition of the present motion, defendant's request is moot as it concerns this action.

Savings & Loan. This action arises out of a transaction in which the plaintiffs claim that they were fraudulently induced by the defendants to purchase real property in Baltimore, Maryland, from defendant Diaz.

* * *

[p. 4] racketeering as well as in lawful activities independent of the racketeering, such as the sale of real estate and the practice of law. Finally, Count XI alleges that the defendants engaged in mail and wire fraud on numerous occasions over the course of at least four years.[2] In Counts XII, XIII, and XIV, the plaintiffs restate the elements alleged in support of the § 1962(c) claim in terms of "acquisition and operation" of the enterprises to state a claim under § 1962(a), "acquisition and maintenance" of an interest in the enterprises to state a claim under § 1962(b), and conspiracy for purposes of § 1962(d).

In spite of the fact that these allegations facially satisfy the RICO pleading requirements, Baltimore Savings argues that the complaint must be dismissed because plaintiffs have failed to properly allege the existence of a RICO "enterprise." As defined by statute, an "enterprise" is "any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact, although not a legal entity." 18 U.S.C. § 1961(4). The Supreme Court has interpreted "enterprise" to mean "a group of persons associated together for a common purpose of engaging in a course of

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[2] These allegations are not merely conclusory, but incorporate the rather detailed allegations of fraudulent conduct which form the basis for the state law claims.

conduct," with the members "function[ing] as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Further, a RICO "enterprise" must be "separate and apart from the pattern of activity in which it engages." *Id.* at 583. In other words, a RICO enterprise must

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[p. 7] In *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir. 1990), *cert. denied sub nom. Granito v. United States*, 111 S.Ct. 130, 59 (1990), the Court rejected a challenge to RICO similar to that made by Baltimore Savings. Key to its decision, and to the decision of this Court, is the rule that "in the absence of first amendment considerations, vagueness challenges must be examined in light of a case's particular facts." *Id.* The *Angiulo* Court found that, under the facts of the case developed at trial, persons of ordinary intelligence would have had adequate notice that the conduct of the defendants at issue *in that case* constituted a "pattern of racketeering activity" under RICO. *Id.*

In this case, the defendants are alleged to have engaged in a pattern of conduct by which they fraudulently induced numerous victims to purchase real estate at unfair prices. Plaintiffs specifically allege that the defendants (1) repeatedly used the same techniques for luring victims, (2) made essentially the same misrepresentations, and (3) played the same roles in each fraudulent scheme. Accepting these allegations as true, the Court finds that a person of ordinary intelligence would have been on notice that these acts constituted a "pattern

of racketeering activity" under the "continuity plus relationship" approach announced by the majority in *Northwestern Bell.* 492 U.S. at 239. *See Uniroyal Goodrich Tire Co. v. Mutual Trading Corp.*, 749 F.Supp. 869, 874 (N.D. Ill. 1990).[5]

* * *

[p. 9] that scheme, and what was obtained thereby." *Id.* It is simply not necessary, as defendants apparently contend, that a complaint allege specific facts sufficient to prove each element of these cause of action.

In their complaint, plaintiffs allege ample facts to set forth a scheme on the part of the defendants to defraud them during the course of a particular transaction. The complaint lists several allegedly false statements and intentional omissions made by Resnick on behalf of Baltimore Savings at the closing, and alleges that these false statements and omissions induced the plaintiffs to enter into an unfavorable transaction, causing them damages. Further, plaintiffs allege scienter on the part of Baltimore Savings.

These allegations satisfy the requirements of Rule 9(b), and are sufficient to survive a general attack under Rule 12(b)(6). As noted above, the present posture of the case limits the Court's review to the bare legal sufficiency of the allegations, and the Court expresses no opinion as to whether the alleged statements and omissions would

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[5] Baltimore Savings cites *Firestone v. Galbreath*, 747 F.Supp. 1556 (S.D. Ohio 1990), in which the Court held the "pattern" requirement unconstitutionally vague and granted a

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support a tort action when viewed under the standards applicable to a motion for summary judgment.

Accordingly, it is this 14th day of February, 1992, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendant's motion to dismiss BE, and hereby IS, DENIED; and

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